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No. 88-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GLEN F. MILLER,

Petitioner,

v.

BOBBY L. PERSON and
UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the court of appeals violate petitioner's Sixth Amendment right to trial by jury and Fed. R. Evid. 201(g) by holding that the district court judicially noticed its civil injunctive order and properly instructed the jury that it was required to accept as conclusive the existence of that order at petitioner's trial on criminal contempt charges?

2. Did the court of appeals misapply this Court's decision in *Young* v. *U.S. ex rel. Vuitton et Fils S.A.*, 107 S.Ct. 2124 (1987), in affirming petitioner's conviction, where the district court authorized respondent's counsel in the underlying civil proceeding, rather than a disinterested attorney, to instigate and for a time remain in sole charge of the contempt prosecution, and special counsel controlled the prosecution after appointment of government counsel?

3. Did the court of appeals misapply the doctrine of implied bias in affirming petitioner's conviction, where the district court refused to exclude certain jurors for cause and effectively alerted them during *voir dire* that they were class beneficiaries of the injunctive order and parties in the underlying civil litigation under Fed. R. Civ. Pro. 23(b)(2)?

PARTIES BELOW

The following persons were parties to the proceeding in the United States Court of Appeals for the Fourth Circuit, the court whose judgment is sought to be reviewed:

Bobby L. Person
United States of America
Glen F. Miller

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OPINION BELOW

The district court's judgment of conviction is unreported, but is reproduced herein at Appendix 1a. The court of appeals' opinion affirming the district court's judgment of conviction is reported at 854 F.2d 656 (4th Cir. 1988) and is reproduced herein at Appendix 4a.

JURISDICTION

The judgment sought to be reviewed by writ of certiorari was dated and entered August 16, 1988. The court of appeals' order denying petitioner's request for rehear-

ing and rehearing *en banc* was entered and filed September 13, 1988, and is reproduced herein at Appendix 23a. The statutory provision conferring jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254(1) (1982).

FEDERAL RULES INVOLVED

Rule 201. Judicial Notice of Adjudicative Facts

(g) Instructing jury.—In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

STATEMENT OF CASE

Glen F. Miller, the petitioner herein, was found guilty of two counts of criminal contempt by a jury under 18 U.S.C. § 401(3)[1] for violating an injunction prohibiting infringement of respondent's civil rights. The injunction that petitioner allegedly violated resulted from the settlement of a class action suit brought by Bobby L. Person ("Person") against petitioner and others in the United States District Court for the Eastern District of North Carolina during June, 1984. (App. 1-18.)[2] Person alleged in his suit that petitioner and the other defendants had engaged in a series of violent and intimidating acts

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[1] That provision provides: "A court of the United States shall have power to punish by fine or imprisonment at its discretion, such contempt of its authority, and none other, as (3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command."

[2] All references to the Appendix ("App.") refer to the Joint Appendix filed in the Court of Appeals.

throughout North Carolina with the purpose of preventing black citizens, and others acting in concert with them, from freely exercising their rights under state and federal law. (App. 1-18.) Person sought declaratory and injunctive relief and damages. The district court ultimately granted Person's motion for class certification to pursue those claims on behalf of "all black citizens in the State of North Carolina who seek to exercise their state and federal rights free from interference by the defendants." (App. 38.)

The parties thereafter entered into a settlement agreement during January, 1985. (App. 33-34.) Under that agreement, the district court entered an order on January 18, 1985, permanently enjoining petitioner and others from, *inter alia*, "operat[ing] a paramilitary organization and do[ing] other acts prohibited by North Carolina General Statutes 14-288.20(b)(1) & (b)(2) and 14-10."[3] (App. 40.) The injunction became final in the district court's order confirming class approval entered during September, 1985. (App. 70-72.)

Person's counsel, Morris S. Dees ("Dees"), subsequently moved the district court to cite petitioner and the other defendants for criminal contempt resulting from alleged violations of the January 18, 1985 injunctive order. (App. 75-85.) Dees further moved the district court to appoint him and his colleagues at the Southern Poverty Law Center as special counsel to prosecute the criminal contempt action. (App. 75-85.) The district court found probable cause to believe that petitioner and others were engaged in conduct contumacious of the injunctive order and authorized Dees to represent the prosecution during

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[3] Those statutes are reproduced in the court of appeals' opinion at Appendix 6a.

April, 1986, without first referring the case to the appropriate prosecuting authority. (App. 95-96.)

Petitioner filed his pretrial motion opposing the appointment of Dees as special counsel during June, 1986. (App. 166-169.) He urged, *inter alia*, that Dees' appointment would violate his right to be prosecuted by an impartial prosecutor. (App. 168.) The district court denied petitioner's motion, relying upon the Second Circuit's decision in *United States ex rel. Vuitton et Fils S.A.* v. *Klayminc*, 780 F.2d 179 (2nd Cir. 1985). However, some two weeks before the case was originally scheduled for trial, the district court ordered that "the criminal prosecution of this action shall be under the direct supervision and control of the United States Attorney for this district" and that Dees "may *assist* the United States Attorney prior to and during the course of the trial."[4] (Emphasis supplied.) (App. 193.) The district court thereafter declined the United States Attorney's suggestion that the caption of the case should be changed to reflect the government's involvement. (App. 441.)

At the jury selection process commencing July 8, 1986, petitioner urged the district court to excuse for cause all jurors who were class beneficiaries of the injunctive order and parties in the underlying civil proceeding under Fed. R. Civ. Pro. 23(b)(2). (App. 573-574, 584-585, 591-592, 600, 617.) The district court incorrectly observed that

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[4] Dees did not abide by the district court's order and effectively controlled the criminal prosecution even after appointment of the United States Attorney. As the Court will see, Dees singly conducted the prosecution until the case was transferred to the United States Attorney's Office; Dees took substantially more time in opening and closing arguments than did government counsel; Dees examined all fact witnesses and cross-examined every defense witness; and Dees responded to most of the objections and arguments at trial.

prospective jurors had not been apprised of Person's class action suit underlying the contempt prosecution and denied petitioner's request.[5] (App. 585.) Consequently, petitioner utilized peremptory challenges in his unsuccessful bid to excuse those jurors from the panel. (App. 574, 586, 591, 599, 600.)

The case proceeded to trial commencing July 21, 1986. At the close of the prosecution's evidence and again at the close of all the evidence, petitioner moved for acquittal. (App. 1107-1128, 1354.) The district court denied those motions and submitted the case to the jury, which ultimately convicted petitioner of criminal contempt. The trial court denied petitioner's post-trial motions.

Petitioner appealed, urging, *inter alia*, that the prosecution's failure to introduce the civil injunctive order into evidence at his trial on charges of criminal contempt required reversal of his conviction. Moreover, petitioner pointed out that the trial court improperly instructed the jury that it was required to accept the existence of that order as a matter of law in contravention of Fed. R. Evid. 201(g). The court of appeals rejected those contentions, citing Fed. R. Evid. 201(c). The court held that "the district court was well within its discretion to take judicial notice of its order and by this means to lay it before the jury for consideration." 854 F.2d at 660 (1988).

Petitioner also contended that the district court's initial appointment of Dees as special prosecutor to instigate and for a time remain in sole charge of the prosecution, as

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[5] The record discloses that the district court effectively advised prospective jurors during *voir dire* that they were parties in the underlying civil litigation and class beneficiaries of the injunctive order under which they would ultimately be asked to pass judgment on petitioner's guilt or innocence. (App. 522, 524.)

well as Dees' control over the proceedings even after appointment of the United States Attorney, violated his right to be prosecuted by an impartial prosecutor. Recognizing the relevance of *Young* v. *U.S. ex rel. Vuitton et Fils S.A.*, 107 S.Ct. 2124 (1987), the court of appeals nevertheless applied harmless error analysis, 854 F.2d at 664, rejected by this Court in *Young*. *Id.* at 2141. The court of appeals suggested that its directive to district courts to make initial referrals in future cases to the United States Attorney "before authorizing any participation in contempt prosecutions by private counsel" would sufficiently guard against the evil proscribed in *Young*. 854 F.2d at 664. The court further suggested that the mere entry of an order appointing the United States Attorney to control the prosecution and the power of control incident to that appointment give rise to a presumption of regularity that attaches to official conduct, 854 F.2d at 664, notwithstanding uncontradicted references in the record that special counsel effectively controlled the prosecution after appointment of government counsel.[6]

Petitioner further argued that the district court's refusal to exclude for cause jurors who were class beneficiaries of the injunctive order and parties in the underlying civil litigation under Fed. R. Civ. Pro. 23(b)((2) violated his right to be tried by a fair and impartial jury. The court of appeals rejected that contention, holding that "[t]his case does not present one of those extreme situations" justifying the invocation of implied bias. 854 F.2d at 664. The court suggested that jurors who were class beneficiaries of the injunctive order and parties in the underlying civil litigation "have no greater interest in

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[6] See note 4, *ante*.

vindicating the court's authority than any other member of the general public" and that "[t]here is simply no pecuniary or other unique benefit to be gained by the beneficiary class from a finding of contempt." 854 F.2d at 665.[7] The court of appeals therefore affirmed petitioner's contempt conviction.

Petitioner then filed a petition for rehearing and rehearing *en banc* pointing out, *inter alia*, (1) that Fed. R. Evid. 201 does not relieve the prosecution from proving beyond a reasonable doubt all essential elements of the crime charged; (2) that the court of appeals misapplied this Court's decision in *Young;* and (3) that bias should be implied to jurors who were class beneficiaries of the injunctive order and parties in the underlying civil litigation in light of the disclosures made by the trial judge during *voir dire* regarding the background of the case. The court of appeals denied rehearing without explanation or opinion.

REASONS FOR GRANTING THE WRIT

This case presents a setting in which the prosecution had every opportunity to introduce the civil injunctive order into evidence had the prosecution been under the control of a skilled and impartial prosecutor, as the district court directed, at petitioner's trial on charges of criminal contempt. In holding that "the district court was well within its discretion to take judicial notice of its order and by this means to lay it before the jury for consideration," 854 F.2d at 660, the court of appeals failed to recognize that the trial court did not judicially notice its order

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[7] As the Court will see, those jurors did have potential pecuniary and other benefits to be gained from a finding of contempt, discussed *post*, note 12.

and, in any event, improperly instructed the jury that it was required to accept as conclusive the existence of that order.

By sanctioning the district court's novel approach to judicial notice and charge to the jury, the court of appeals totally ignored the proscription of Fed. R. Evid. 201(g). That rule evidences congressional intent—consistent with Sixth Amendment implications—to preserve the prosecution's burden to prove all essential elements of its case without resorting solely to judicial notice. Without citing any authority for using its own standard, the court of appeals implicitly followed prior decisions in the circuit, *see e.g.*, *United States* v. *Harris*, 530 F.2d 576, 578 (4th Cir. 1976), effectively holding that a trial court may judicially notice an essential element of the crime charged absent direct or circumstantial evidence, and then instruct the jury that the element has been proven as a matter of law. That view has been expressly rejected by at least four other circuits. *See United States* v. *Jones*, 580 F.2d 219 (6th Cir. 1978); *United States* v. *Dior*, 671 F.2d 351 (9th Cir. 1982); *United States* v. *Thomas*, 610 F.2d 1166 (3rd Cir. 1979); *United States* v. *Deckard*, 816 F.2d 426 (8th Cir. 1987).

The court of appeals' decision likewise ignores the rule established by this Court in *Young* v. *U.S. ex rel. Vuitton et Fils S.A.*, 107 S.Ct. 2124 (1987), preserving the accused's right to be prosecuted by a fair and impartial prosecutor. Again, without citing any authority for using its own standard, the court of appeals implicitly followed prior decisions in the circuit, *see, e.g.*, *Jones* v. *Richards*, 776 F.2d 1244 (4th Cir. 1985), holding that the belated appointment of the appropriate prosecuting authority removes the taint from the proceedings during the time special counsel was in sole charge of the prosecution.

Moreover, by assuming that the mere entry of an order appointing the United States Attorney and the power of control incident to that appointment give rise to a general presumption of regularity that attaches to official conduct, the court placed form over substance and ignored the fact that most of the critical prosecutorial decisions evidencing control, as explained below, are made outside the presence of the trial court and cannot be gleaned from the record. The court of appeals' approach is overbroad and naive, and is inconsistent with the rule established by this Court in *Young* and that of at least one other circuit. *See Polo Fashions, Inc.* v. *Stockbuyers International, Inc.*, 760 F.2d 698 (6th Cir. 1985). By granting review, this Court can clarify a serious conflict among the circuits as to when assistance by special counsel gives rise to control over the prosecution.

The court of appeals' decision further deprived petitioner of his right to be tried by a fair and impartial jury. By approving the district court's refusal to excuse for cause jurors who were class beneficiaries of the injunctive order and parties in the underlying civil litigation under Fed. R. Civ. Pro. 23(b)(2), the court failed to recognize that the disclosures made by the trial judge during *voir dire* regarding the background of the case were completely unnecessary and extraneous to the jury's understanding of the charges. By granting review, this Court can establish that the facts in the instant case present an "appropriate situation" justifying a finding of implied bias. *Smith* v. *Phillips*, 455 U.S. 209, 224 (1982) (O'Connor, J., concurring).

I

The Court Of Appeals Violated Petitioner's Sixth Amendment Right To Trial By Jury And Fed. R. Evid. 201(g) By Holding That The District Court Judicially Noticed Its Civil Injunctive Order And Properly Instructed The Jury That It Was Required To Accept As Conclusive The Existence Of That Order.

The court of appeals correctly observed that "[a]n essential element of a contempt conviction is that the prosecution show that the defendant violated a court order," 854 F.2d at 660, citing its decision in *Richmond Black Police Officers Ass'n* v. *City of Richmond*, 548 F.2d 123, 129 (4th Cir. 1977). The court further observed that the prosecution never requested the trial court to take judicial notice of its civil injunctive order and that "the prosecution did not introduce the [trial] court's January 18, 1985 order into evidence." 854 F.2d at 660. However, relying upon Fed. R. Evid. 201(c) permitting a court to take judicial notice whether requested or not, the court of appeals held that "the district court was well within its discretion to take judicial notice of its order and by this means to lay it before the jury for consideration." *Id.* In doing so, the court of appeals failed to recognize that the trial court never judicially noticed its civil injunctive order[8] and instructed the jury to accept the existence of that order as a matter of law.

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[8] The government also failed to prove that petitioner had actual notice or knowledge of the injunctive order as required by this Court in *Pettibone* v. *United States*, 148 U.S. 197, 206-207 (1893). Significantly, the trial judge did not judicially notice that petitioner had actual knowledge of the injunctive order and submitted that issue to the jury. While the court of appeals totally ignored that issue both on appeal and rehearing, petitioner asks this Court to reverse the judgment of conviction on this additional ground.

A. Judicial Notice Of The Order.

In *United States* v. *Mentz*, 840 F.2d 315 (6th Cir. 1988), the Sixth Circuit examined the propriety of the defendant's bank robbery conviction under 18 U.S.C. § 2113(a) requiring proof that the deposits of the financial institutions were insured by the FDIC. Since the only evidence that the trial court judicially noticed the insurance status of the financial institutions at the time of the offenses was its charge to the jury, the court of appeals concluded that the government's "reliance on judicial notice principles must fail for a lack of factual support in the record." *Id.* at 322; *accord United States* v. *Jones*, 580 F.2d 219 (6th Cir. 1978); *United States* v. *Dior*, 671 F.2d 351 (9th Cir. 1982). The court of appeals observed that when an adjudicative fact is judicially noticed, particularly a fact which is an essential element of the crime charged, the trial court should identify the fact noticed and articulate its justification for doing so to facilitate intelligent appellate review. *Id.* at 322 (citation omitted). That procedure provides the party opposing judicial notice with not only an opportunity to recognize that judicial notice is being taken, but also an opportunity to be heard. *Federal Rules of Evidence Manual* (4th Ed. 1986) at 60.

When petitioner moved for acquittal because the prosecution failed to introduce the injunctive order into evidence, the trial judge responded, "I think the court order is a part of the proceeding itself. I don't deem it necessary to introduce evidence of that." (App. 1107-1108.) While the court of appeals presumably equated that statement to judicial notice of the injunctive order, it is instead attributable to the trial court's apparent confusion over the fact that criminal contempt proceedings arising out of civil litigation "are between the public and the defendant and are not a part of the original cause." *Gompers* v.

Bucks Stove & Range Co., 221 U.S. 418, 445 (1911). Because the trial court did not judicially notice its injunctive order and, in any event, neither identified the fact noticed, nor articulated its justification for doing so, the court of appeals' conclusion does not find factual support in the record. *United States* v. *Mentz*, *supra*, 840 F.2d at 322. Petitioner asks this Court to preserve the government's burden to prove beyond a reasonable doubt every essential element of the crime charged without relying solely upon judicial notice never clearly taken to sustain a conviction on appeal.[9]

B. The Trial Court's Charge To The Jury.

A critical distinction arises in the manner in which a judicially noticed fact is submitted to the jury in civil and criminal proceedings:

> Instructing jury.—In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. *In a criminal case, the court shall instruct the jury that it may but is not*

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[9] If a defendant's right to require proof beyond a reasonable doubt of all essential elements of the crime charged is to have any meaning at all, that proof, whether by affirmative evidence or judicial notice and, if by the latter, whether upon request of the government or at the instance of the trial judge, must come before the government rests its case and a motion for acquittal is made. To the extent that Fed. R. Evid. 201(f) is inconsistent with the defendant's right to test the sufficiency of the evidence by way of a motion for acquittal, it must yield to the right to move for acquittal. Any other conclusion would place a chilling effect on a defendant's decision to move for acquittal if the government or trial court can supply proof of an essential element after the motion has been made absent direct or circumstantial evidence from which proof of the element can be inferred. *Cf. United States* v. *Jones*, *supra*, 580 F.2d at 224.

> *required to, accept as conclusive any fact judicially noticed.* (Emphasis supplied.)

Fed. R. Evid. 201(g). Under subsection (g), "judicial notice of a fact in a civil case is conclusive while in a criminal trial the jury is not bound to accept the judicially noticed fact and may disregard it if it so chooses." *United States* v. *Jones*, *supra*, 580 F.2d at 223.

The legislative history of Rule 201 clearly reveals that the congressional choice of language in subsection (g) was deliberate. In adopting the present language, Congress rejected a draft of subsection (g) proposed by this Court, which read: "The judge shall instruct the jury to accept as established any facts judicially noticed." The House Report explained its reason for the change:

> Rule 201(g) as received from the Supreme Court provided that when judicial notice of a fact is taken, the court shall instruct the jury to accept that fact as established. Being of the view that mandatory instruction to a jury in a criminal case to accept as conclusive any fact judicially noticed is inappropriate because contrary to the spirit of the Sixth Amendment right to a jury trial, the Committee adopted the 1969 Advisory Committee draft of this section, allowing a mandatory instruction in civil actions and proceedings and a discretionary instruction in criminal cases.

H. Rep. No. 93-650, 93d Cong., 1st Sess. 6-7 (1973), U.S. Code Cong. & Admin. News 7075, 7080 (1974).

The adoption of Rule 201(g) clearly evidences congressional intent to preserve the jury's "traditional prerogative to ignore even uncontraverted facts in reaching a verdict." *United States* v. *Jones*, *supra*, 580 F.2d at 224. Congress was concerned that this Court's "rule violated the spirit, if not the letter, of the constitutional right to a

jury trial by effectively permitting a partial directed verdict as to the facts in a criminal case." *Id.* Rule 201(g) plainly contemplates that the jury in a criminal case shall pass upon facts which are judicially noticed. The jury was prevented from doing so in the instant case in light of the trial court's charge that it was required to accept the existence of the injunctive order as a matter of law. (App. 1418.) *Jones* v. *United States*, *supra*, 580 F.2d at 224; *accord United States* v. *Mentz*, *supra*, 840 F.2d at 322; *United States* v. *Dior*, *supra*, 671 F.2d at 357-358, n.11; *United States* v. *Thomas*, 610 F.2d 1166, 1171-1172, n.10 (3rd Cir. 1979); *United States* v. *Deckard*, 816 F.2d 426, 428 (8th Cir. 1987). Petitioner asks this Court to preserve his Sixth Amendment right to trial by jury on all essential elements of the crime charged by requiring proper instructions from the trial court consistent with Fed. R. Evid. 201(g).

II

The Court Of Appeals Misapplied This Court's Decision In *Young* v. *U.S. ex rel. Vuitton et Fils S.A.*, 107 S.Ct. 2124 (1987), Where The District Court Authorized Respondent's Counsel In The Underlying Civil Proceeding, Rather Than A Disinterested Attorney, To Instigate And For A Time Remain In Sole Charge Of The Prosecution, And Special Counsel Controlled The Prosecution After Appointment Of Government Counsel.

A. The *Young* Decision.

In *Young* v. *U.S. ex rel. Vuitton et Fils S.A.*, *supra*, this Court examined the propriety of the district court's appointment of counsel for the parties who were beneficiaries of an injunction order to prosecute the petitioners on charges of criminal contempt for alleged violations of that order. The Court in the exercise of its supervisory power reversed the petitioners' convictions, holding that "the

[district] court erred in appointing as prosecutors counsel for an interested party in the underlying civil litigation." 107 S.Ct. at 2135. This Court observed that a "court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied." *Id.* at 2134. However, the Court carefully pointed out that it was unnecessary to address the district court's failure to refer because the prosecution had been turned over completely to special counsel for the interested parties in the underlying civil litigation. *Id.* at 2135.

This Court also rejected harmless error analysis in *Young* as being "inappropriate in reviewing the appointment of an interested prosecutor." *Id.* at 2141. The Court was not concerned with actual conflicts of interest or impropriety, but only the opportunity for conflicts to arise and the creation of an appearance of impropriety. *Id.* at 2137. The Court observed that application of harmless error analysis would require a reviewing court to engage in unguided speculation and subtle calculations of judgment best suited for review by lower courts, *id.* at 2141, and that appointment of an interested prosecutor is an error "so fundamental and pervasive that [it] require[s] reversal without regard to the facts or circumstances of the particular case." *Id.* at 2138-2139.

B. Control By Special Counsel Prior To Appointment Of The United States Attorney.

The record in this case clearly reveals that special counsel investigated, instigated and for a time was in sole charge of the prosecution. Special counsel moved the district court to cite petitioner for criminal contempt and to appoint him and his colleagues to prosecute the criminal contempt action for alleged violations of the January 18,

1985 injunctive order. (App. 75-85.) The district court did not initially refer the case to the appropriate prosecuting authority, but instead authorized special counsel representing the parties in the underlying civil litigation to prosecute the petitioner on charges of criminal contempt. (App. 94-96.)

Prior to the district court's belated appointment of the United States Attorney to direct and control the prosecution some two weeks before the case was originally scheduled for trial (App. 190-194), special counsel filed various motions to alter or amend the original contempt citation and composite motions recounting the factual allegations in support of the charges against petitioner. (App. 99-101, 115-120, 177-181, 216-230, 255-266.) Special counsel also served subpoenas to secure records and scheduled pretrial depositions of petitioner and others in contravention of their Fifth Amendment privilege against self-incrimination. (App. 102-103, 125-148, 156-165.)

Special counsel usurped the prosecutorial discretion reserved for the disinterested prosecutor in all critical decisions incident to prosecution. Those decisions, made outside the presence of the trial court, included, *inter alia*, the determination of which persons would be the target of his investigation, what methods of investigation to use, what information would be sought as evidence, which persons should be charged with what offenses, whether any individuals should be granted immunity, and which persons should be utilized as witnesses. *Young*, *supra*, 107 S.Ct. at 2137. His participation from inception of the prosecution through appointment of the appropriate prosecuting authority infected the proceeding with "the *potential* for private interests to influence the discharge of public duty." *Id.*, at 2136-2137 (emphasis in original). Special counsel's role in contemporaneously

serving two masters during all critical periods of the prosecution created the opportunity for conflicts to arise and the appearance of impropriety regardless of whether either existed in actuality. Since harmless error analysis is inappropriate, *id.* at 2141, petitioner asks this Court to correct the court of appeals' erroneous application of the rule established in *Young*.

C. *Young's* Impact On Assistance By Special Counsel.

This Court suggested in *Young* that an interested prosecutor's "familiarity may be put to use in *assisting* a disinterested prosecutor in pursuing the contempt action, but [does not] justify permitting counsel for the private party to be in control of the prosecution." 107 S.Ct. at 2137, n.17 (emphasis in original). However, in articulating the rationale permitting special counsel to assist a disinterested prosecutor and suggesting the limits of assistance, this Court apparently assumed that the appropriate prosecuting authority or other disinterested counsel would become involved in the prosecution from its inception immediately after the contempt allegations had been first brought to the attention of the trial court. Otherwise, there would be no reason "to put familiarity to use" by way of "assistance" if special counsel had initially and for a time assumed control of the prosecution alone when critical prosecutorial decisions were made.

In *Polo Fashions, Inc.* v. *Stockbuyers International, Inc.*, 760 F.2d 698 (6th Cir. 1985), the Sixth Circuit examined the propriety of the district court's appointment of counsel for the parties who were beneficiaries of an injunction order to prosecute the defendants on charges of criminal contempt for alleged violations of that order. While recognizing that counsel for an interested party may be appointed to assist disinterested counsel, the

court of appeals held that "an attorney for a party in underlying litigation may not conduct criminal contempt proceedings as sole or primary counsel." *Id.* at 705. Significantly, *Polo Fashions* was pending on certiorari when *Young* was decided. *Young*, *supra*, 107 S.Ct. at 2137-2138, n.18. Since this Court subsequently denied certiorari in *Polo Fashions, Inc.*, 107 S.Ct. 2480 (1987), that denial at least suggests that the Sixth Circuit correctly perceived the limits of special counsel's role in the conduct of criminal contempt proceedings.

D. Control By Special Counsel After Appointment Of The United States Attorney.

The record in this case clearly discloses that special counsel continued to control the prosecution even after appointment of government counsel. Special counsel actively participated at pre-trial proceedings relative to a proposed plea agreement with petitioner negotiated by special counsel and the United States Attorney. (App. 455-458.) At trial, special counsel took substantially more time in opening and closing arguments than did government counsel. (App. 662-672, 1357-1381, 655-662, 1395-1404.) During opening statement, the United States Attorney introduced special counsel as "one of the major trial attorneys on this case" and characterized his role as "working with Mr. Cohen and Mr. Dees." (App. 656.) Special counsel examined all principal fact witnesses for the prosecution and cross-examined every defense witness. (App. 692-782, 922, 929, 1137, 1183, 1270, 1287, 1295, 1299, 1339.) Special counsel responded to most of the objections and arguments raised at trial. (App. 411-425, 750, 769, 792-794, 1120-1126.) At the conclusion of trial, he prepared responses to various motions and the sentencing memorandum endorsed by him and the United States Attorney. (App. 312-326, 334, 337.)

The only conclusion that can be drawn from an examination of this record by even the most casual observer is that special counsel controlled the prosecution and in fact orchestrated the entire proceeding. Special counsel did not "assist" the United States Attorney, but rather the latter, by his own admission, "assisted" special counsel. (App. 656.) The district court compounded that error by rejecting the United States Attorneys' suggestion that the caption of the case should be changed to reflect the government's involvement. (App. 441.) In doing so, the district court never made it clear whether special counsel and the United States Attorney were representing the public interest or the private interests of the parties in the underlying civil litigation. Special counsel's civil interest in the case on behalf of the parties who were class beneficiaries of the injunction order so infected "the prosecution with the possibility that private vengeance [was] substituted for impartial application of the law, that prejudice to [petitioner] need not be shown." *Cantrell* v. *Commonwealth*, 229 Va. 387, 394, 329 S.E.2d 22, 27 (1985).

E. Implications Of The Court Of Appeals' Decision.

While the court of appeals accepted the essential accuracy of petitioner's assertions regarding the degree of special counsel's participation, it viewed the critical question as "who was in actual control of the prosecution—both formally and in practical effect." 854 F.2d at 663. In rejecting petitioner's contention that special counsel functioned as "lead" or "primary" counsel, the court held that "[t]he quantitative division of trial work obviously has some relevance to that [question], but it cannot be decisive." *Id.* However, the court of appeals ignored the fact that most of the critical prosecutorial decisions evidencing control had already been made by special counsel before government counsel was appointed some two

weeks before the case was originally scheduled for trial. Moreover, those decisions—both before and after appointment of government counsel—were made outside the trial court's presence and cannot be gleaned from the record. While the quantitative division of trial work may not be determinative, it is most often the only evidence a reviewing court will have bearing on the issue of control.[10]

By assuming that the mere entry of an order appointing the United States Attorney and the power of control incident to that appointment give rise to a general presumption of regularity that attaches to official conduct, 854 F.2d at 664, the court of appeals placed form over substance and reduced this Court's decision in *Young* to a mere formalistic inquiry into whether disinterested counsel was "officially appointed." This Court never applied any presumption of regularity in *Young*. Quite to the contrary, this Court strongly implied that any doubt regarding the potential for conflicts of interest to arise should be resolved by finding impropriety, and not regularity. 107 S.Ct. at 2135-2136, n.13, 14, 15. This Court, unlike the court of appeals, should require the government to demonstrate on review that no actual or apparent impropriety attached to the proceedings either during the time that special counsel remained in sole charge of the prosecution or after appointment of government counsel.

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[10] Assuming arguendo that harmless error analysis may be appropriate, the court of appeals should have at least remanded the case to the district court for a factual determination of special counsel's role in various aspects of the case not fully disclosed by the record, discussed *ante*. But even that potential remedy would not ensure the absence of misconduct arising from the subtle "effect of conflicting interests on the integrity of prosecutorial decisions," *Young*, *supra*, 107 S.Ct. at 2148 (Powell, J., dissenting), because they almost always occur outside the trial court's presence and are virtually impossible to discover, let alone demonstrate.

Petitioner accordingly asks this Court to reaffirm his right to be prosecuted by a fair and impartial prosecutor from the inception of criminal contempt proceedings and to condemn participation by special counsel amounting to control over the prosecution.

III

The Court Of Appeals Misapplied The Doctrine Of Implied Bias In Affirming Petitioner's Conviction Where The District Court Refused To Exclude Certain Jurors For Cause And Effectively Alerted Them During *Voir Dire* That They Were Class Beneficiaries Of The Injunctive Order And Parties In The Underlying Civil Litigation Under Fed. R. Civ. Pro. 23(b)(2).

Although this Court in *Smith* v. *Phillips*, *supra*, held that bias could not be implied to a juror who applied for a job in the district attorney's office during the course of a criminal proceeding, it did not foreclose "the use of implied bias in appropriate situations." 455 U.S. at 224 (O'Connor, J., concurring). Justice O'Connor observed that situations justifying a finding of implied bias "might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." *Id.* at 222. While those situations were not meant to be exhaustive, they certainly bring within their purview the jurors in this case who were class beneficiaries of the injunctive order and parties in the underlying civil litigation under Fed. R. Civ. Pro. 23(b)(2).[11] *See In Re Cement Antitrust Litigation*, 688

[11] Unlike *Smith*, those jurors' interest in a guilty verdict is all too clear: A guilty verdict would immediately and automatically further the jurors' interests as class beneficiaries. A guilty verdict in *Smith*, on the other hand, inured to the juror's benefit only in the unlikely event that the district attorney's office hired applicants serving as jurors based on their votes to convict.

F.2d 1297, 1313 (9th Cir. 1982), *aff'd mem.*, 459 U.S. 1191 (1983) (holding that a trial judge whose wife had a pecuniary interest in a class action suit should recuse himself for cause).

The record in the instant case discloses that the district court advised prospective jurors during *voir dire* that they "had been called to serve . . . in a case" brought by "Person, individually and on behalf of all others similarly situated" (App. 522), that the case began as a civil proceeding brought by "Person and others . . . seeking . . . relief from [the] defendants" (App. 522), and that the defendants had been ordered not to "harm any black person . . . who is exercising or attempting to exercise any right or privilege under the laws of North Carolina or the United States government." (App. 524.) The United States Attorney advised the jury that the "law suit charged the Klan with operating a paramilitary army that was being used to harass blacks in North Carolina (App. 657), and asked the jury "to vindicate the rights of minority citizens in North Carolina to live their lives free of harassment, intimidation and bodily harm by the Klan." (App. 661.)

The district court's comments effectively advised prospective jurors that they were class beneficiaries of the injunctive order under which they would ultimately be asked to pass judgment on petitioner's guilt or innocence. Those comments were completely extraneous and unnecessary to the jury's understanding of the charges under the injunctive order. The United States Attorney's comments compounded the district court's error. Those comments and remarks infected the proceeding with the probability of substantial bias. This bias may have been a conscious, calculated effort to vindicate those very rights and the jury may have believed that they could only be

vindicated if petitioner was found guilty. *Smith* v. *Phillips*, 455 U.S. at 229 (Marshall, J., dissenting). As Justice Marshall observed in *Smith*, a juror whose interest may be affected by the outcome of litigation "may decide to vote for a verdict of guilty regardless of the evidence, and he may attempt to persuade the other jurors that acquittal is not justified." *Id.*

There is also a very serious question of unconscious bias on the part of jurors in this case. "Only individuals of extraordinary character would not be affected in some way by their interest" in vindication of their rights. *Id.* The opportunity to reopen their class action damage claim due to petitioner's failure to abide by the terms of the decree dismissing that claim may have supplied the necessary motivation to convict.[12] Subconsciously, "the juror[s] may [have] tended to favor the prosecutor simply because they [felt] some affinity" with the very class of which they were members. *Id.* While "juror[s] may make a sincere effort to remain impartial," the probability that they may be unable to do so nevertheless exists. *Id.*

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[12] In making the observation that class members had "no greater interest in vindicating the court's authority than any other member of the general public" and "no pecuniary or other . . . benefit to be gained . . . by a finding of contempt," 854 F.2d at 665, the court of appeals apparently overlooked the fact that class members asserted various civil rights and state law claims and sought declaratory and injunctive relief and damages. (App. 1-18.) Since breach of a settlement agreement may permit an aggrieved party to reopen and pursue his original claim, there was a potential pecuniary benefit to be gained by class members from a finding of contempt. Class members, unlike the general public, could reopen their original claim or proceed on new claims predicated upon petitioner's subsequent actions after entry of the injunctive order. Moreover, contempt connotes "wilfulness" and, thus, the possibility for punitive damages, and former adjudication may apply in subsequent civil proceedings.

Contrary to the court of appeals' observation, petitioner is not suggesting "that no black citizen could ever serve as an impartial juror in an action involving a white supremacist, group or individual, as a party." 854 F.2d at 665. Petitioner is instead contending that jurors who were class beneficiaries of the injunctive order and parties in the underlying civil litigation, regardless of their racial or ethnic backgrounds, should have been excluded for cause and that he should not have been forced to use his peremptory challenges in his unsuccessful attempt to excuse them. *Cf. Darbin* v. *Nourse*, 664 F.2d 1109 (9th Cir. 1981). While there may be some instances in which class members could sit fairly and impartially, bias should be implied in this instance in light of the disclosures made by the trial judge regarding the background of the case (App. 522, 524) and the remarks made by the United States Attorney asking jurors to vindicate their rights and the rights of other black citizens. (App. 657, 661.)

The right to a trial by an impartial jury lies at the very heart of due process. *Irvin* v. *Dowd*, 366 U.S. 717, 721-722 (1961). As this Court observed in *Peters* v. *Kiff*, 407 U.S. 493 (1972), actual bias is virtually impossible to prove. It is necessary, therefore, to "decide on principle which side shall suffer the consequences of unavoidable uncertainty." *Id.* at 504. The potential for harm and the importance of the right to an impartial jury requires that all doubts should be resolved in favor of the accused. *Id.* Petitioner asks this Court to imply bias to those jurors who were class beneficiaries of the injunction order and parties in the underlying civil litigation under the facts presented in this case and to preserve his right to trial by a fair and impartial jury.

CONCLUSION

The issues presented in this case are of great importance, both with respect to federal procedure and federal

law, governing future decisions in this and other circuits. Petitioner asks this Court to grant the petition and to reverse the judgment of conviction for the reasons stated herein.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

APPENDIX

United States District Court

FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

Docket No. 84-534-Civ-5
Raleigh Division

UNITED STATES OF AMERICA

v.

GLENN MILLER, *Defendant*

JUDGMENT AND PROBATION/COMMITMENT ORDER
AO-245 (9/82)

In the presence of the attorney for the government the defendant appeared in person on this date at Fayetteville, NC:

September 9, 1986

COUNSEL

☒ **WITHOUT COUNSEL** However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☐ **WITH COUNSEL** _____
(Name of Counsel)

PLEA

☐ **GUILTY**, and the court being satisfied that there is a factual basis for the plea,

☐ **NOLO CONTENDERE**, ☒ **NOT GUILTY**

CF15FINDING & JUDGMENT

There being a verdict of:

☐ **NOT GUILTY.** Defendant is discharged

☒ **GUILTY, by the jury in Counts 1 & 2 on 7-25-86.**

Defendant has been convicted as charged of the offense(s) of:

criminal contempt — operated a paramilitary organization and violated NCGS § 14-288.20(b)(1) as charged in Count 1; and criminal contempt — operated paramilitary organization and violated NCGS § 14-10, as charged in Count 2 — in violation of: 18 U.S.C. § 401

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of:

COUNT 2 — Six (6) months.
COUNT 1 — Six (6) months.

SPECIAL CONDITIONS OF PROBATION

Execution of the sentence on Count 1 is hereby suspended and the defendant is placed on probation for a period of three (3) years, with the period of probation consecutive to the confinement portion of the sentence served on Count 2, and on the following terms and conditions:

1. that he obey all local, state and federal laws
2. that he comply with the rules and regulations of the Probation Office
3. that he disassociate himself completely from the White Patriot Party and abstain from any contact with present or former members of the party
4. that he not engage in any paramilitary activity or training
5. that he have no contact with the following persons and/or groups: The Order; The Aryan Nations; Iron Horse Rebels, Southern National Party; National Alliance; Knights of the Ku Klux Klan; Invisible Empire, Knights of the Ku Klux Klan; White Knights of Liberty; The Mountain Kirk (Church); White American Resistance; White Aryan Resistance, White Southern Rebels; American Patriot Party; Silent Brotherhood; White American Political Association; White American Bastion; Christian Knights of the Ku Klux Klan; Confederation of Independent Orders, Knights of the Ku Klux Klan; Church of the Creator; National Socialist Party; The Covenant, the Sword, the Arm of the Lord (CSA); Elohim City, Church of Israel, Schell City, Mo.; White Camellia Knights; Knights of the

Ku Klux Klan; National States Rights Party; American First Committee; Illinois Knights of the Ku Klux Klan; Edward Fields; Tom Metzger; Richard Butler; Thom Robb; Harold Covington; William Pierce; James Ellison; John Millar; David Eden Lane; Louis Beam; Elmore Greaves; Robert McCampbell; Robert Miles; Alex Young; Don Black; Art Jones; Stanley McCollum; or K.A. Badynski.

Defendant is to pay a special assessment of: $25.00 on each count, for a total of $50.00.

The Court finds restitution is not appropriate as there is no victim as far as restitution is concerned.

DATED: 9 September 1986

/s/ W. Earl Britt
W. EARL BRITT
CHIEF UNITED STATES DISTRICT JUDGE

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Defendant is allowed to go under existing bond and report at own expense to the institution designated by the U.S. Bureau of Prisons at 12 o'clock noon on the date designated by the U.S. Marshals Office.

/s/ W. Earl Britt
September 9, 1986
W. EARL BRITT
CHIEF U.S. DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 86-3882

BOBBY L. PERSON, *Plaintiff-Appellee*,
UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

GLEN F. MILLER, *Defendant-Appellant*,
and
CAROLINA KNIGHTS OF THE KU KLUX KLAN, AN UNINCORPORATED ASSOCIATION; JERRY MICHAEL LEWIS; JOAN SHORT; GREGORY SHORT; CHARLES COX; GORDON IPOCK; STEPHEN MILLER; ROBERT STONER; VINCE WITT; TOMMY DRIGGERS; BOYD MALONEY; BEAUFORD OGLE; TONY HENRICKS; CULBERT WILKERSON; STERLING HENSON; RICHARD POUNDER; KEN PENLEY; RICKY NUNNERY; TONY SHELDON; JEFF JOHNSTON; JEFF CARTRETT,

Defendants.

Appeal From The United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, Chief District Judge. (84-534)

Argued February 1, 1988. Decided August 16, 1988

Before RUSSELL, PHILLIP, and SPROUSE, Circuit Judges.

Thomas Ralph Scott (Street, Street, Street, Scott & Bowman on brief) for Appellant; Irving Gornstein, Department of Justice, Civil Rights Division (J. Douglas McCullough, Acting United States Attorney; William Bradford Reynolds, Assistant Attorney General; David K. Flynn, Department of Justice; Morris Dees, Southern Poverty Law Center on brief) for Appellees.

PHILLIPS, Circuit Judge:

Glen Miller challenges a judgment finding him in contempt of a court order prohibiting him from operating a paramilitary organization and doing certain other acts prohibited by North Carolina law. He raises a number of issues on appeal, principally that there was insufficient evidence to support the finding of contempt; that the court's appointment of counsel for an interested party to prosecute the action violated the Supreme Court's rule established in *Young* v. *U.S. ex rel. Vuitton Et Fils S.A.*, 107 S. Ct. 2124 (1987); that the district court should have excused for cause all potential jurors who were beneficiaries of the court order allegedly violated; that the district court should have granted Miller's motion for a separate trial from his co-defendant, Stephen Miller; and that the district court allowed the admission of irrelevant and unfairly prejudicial evidence against Miller. We believe that these and Miller's other contentions are without merit and therefore affirm.

I

In June 1984, Bobby Person, a black citizen of the United States and the State of North Carolina, filed a class action against the Carolina Knights of the Ku Klux Klan (CKKKK), its leader, Glen Miller, and other named and unnamed individuals associated with the CKKKK. The suit alleged that the defendants had engaged in a series of violent and intimidating acts throughout North Carolina with the purpose of preventing black citizens and others acting in concert with them from freely exercising their rights under state and federal law. The district court ultimately certified a class consisting of "all black citizens in the State of North Carolina who seek to exercise their state and federal rights free from interference by the defendants."

In January 1985, the parties entered into a consent decree which prohibited Miller and the CKKKK from, among other things, "operat[ing] a paramilitary organization and do[ing]

other acts prohibited by North Carolina General Statutes 14-288.20(b)(1)[1] and (b)(2)[2] and North Carolina G.S. 14-10."[3] The agreement also authorized "the Court to enter an Order encompassing the terms and conditions of the agreement." On January 18, 1985, the court held a hearing on the terms of the consent agreement, attended by Person's counsel and Miller. The order was entered later that day. In September 1985, after the giving of constructive notice by publication to class members, the court made the decree final as to Miller, the CKKKK, and its successor organization, the White Patriot Party (WPP). Miller had changed the name of the organization after the entry of the court's order in January 1985.

In April 1986, Person's counsel, Morris Dees, moved, on a supporting complaint, to cite Miller and the WPP for criminal contempt of court. The complaint alleged that Miller and the WPP had violated the court's order by operating a paramilitary organization and engaging in conduct violative of § 14-10. The complaint was later amended also to allege a violation of the

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[1] N.C. Gen. Stat. § 14-288.20(b)(1) provides that a person is guilty of a felony if he

> [t]eaches or demonstrates to any other person the use, application, or making of any firearm, explosive or incendiary device, or technique capable of causing injury or death to persons, knowing or having reason to know or intending that the same will be unlawfully employed for use in, or in furtherance of, a civil disorder.

[2] N.C. Gen. Stat. § 14-288.20(b)(2) provides that a person is guilty of a felony if he

> [a]ssembles with one or more persons for the purpose of training with, practicing with, or being instructed in the use of any firearm, explosive or incendiary device, or technique capable of causing injury or death to persons, intending to employ unlawfully the training, practicing, instruction, or technique for use in, or in furtherance of, a civil disorder.

[3] N.C. Gen. Stat. § 14-10 makes it unlawful for any persons to

> band together and assemble to muster, drill or practice any military evolutions except by virtue of the authority of an officer recognized by law, or of an instructor in institutions or schools in which such evolutions form a part of the course of instruction.

order because Miller and the WPP had operated a paramilitary organization and engaged in conduct violative of § 14-288.20(b)(1). The district court ordered Miller and the WPP to show cause why they should not be found in contempt and set a hearing for July 1986.

Dees was initially authorized by the court to prosecute the contempt action. From the time that the original complaint was filed until June 1986, Dees was actively engaged in preparing the case. He filed several amendments to the original complaint, moved the court to add various parties as defendants, one of which was Stephen Miller, and conducted discovery. In June 1986, counsel for Miller moved to have Dees disqualified on the grounds that Dees would be a material witness at trial and that Dees' appointment as prosecutor violated the North Carolina Rules of Professional Conduct and Miller's right to be prosecuted by an impartial prosecutor as guaranteed by the Due Process Clause.

Noting a conflict of recent circuit court decisions on whether counsel for an interested party could prosecute a related criminal contempt action, specifically *United States ex rel Vuitton et Fils S.A.* v. *Klayminc*, 780 F.2d 179 (2d Cir. 1985) (appointment not improper) and *Polo Fashions, Inc.* v. *Stock Buyers Int'l, Inc.*, 760 F.2d 698 (6th Cir. 1985) (district court abused discretion by appointing interested prosecutor), the court ordered that the prosecution would be under the "direct supervision and control" of the United States Attorney's Office for the Eastern District of North Carolina. The court further ordered that Dees could "assist the United States Attorney prior to and during the course of the trial." Shortly after the entry of the court's order, the prosecution filed a composite complaint against Glen Miller and the WPP which was signed by the United States Attorney for the Eastern District of North Carolina and Dees. The case came to trial in late July 1986.

At trial, the prosecution presented James Holder and Robert Jones as key witnesses. Holder was a member of the

CKKKK in 1982 and 1983. He testified that Miller's ultimate goal was to overthrow the government, beginning with taking control of a large part of the south. This plan was apparently based on a fictional book, *The Turner Diaries*, which describes the overthrow of the government in 1991 by a white supremacist group known as "The Order." Holder explained that Miller regarded the book as a guide for his organization and actively recommended that all members read it. Holder himself was in charge of providing military training for the CKKKK and engaged in exercises which included weapons and tactical training. The purpose of these exercises was to prepare for Miller's plan to overthrow the government.

Jones testified that Miller asked him to assist in the CKKKK's training and to help acquire weapons and explosives for the group. Miller apparently left the details of these activities ~~to be worked~~ out by Jones and Miller's subordinates, including Stephen Miller. Jones undertook to supply the WPP with various firearms, explosives, and other military equipment as well as provide training in the use of these items. He continued this activity until his arrest in July 1985. Jones testified that he met with Miller after his arrest and that Miller asked him not to disclose any information to the authorities, silence for which he offered to pay Jones $1300 per month.

On this and the other evidence, the jury convicted Miller of (1) operating a paramilitary organization and violating N.C. Gen. Stat. § 14-288.20(b)(1), and (2) operating a paramilitary organization and violating N.C. Gen. Stat. § 14-10.

This appeal followed.

II

Miller first raises a number of issues all relating to whether there was sufficient evidence for the jury to find him in criminal contempt of court: that the prosecution failed to prove the existence of the order that he allegedly violated, an essential element of a contempt conviction; that the prosecution failed to prove that he simultaneously operated a paramilitary organiza-

tion and violated all three listed North Carolina statutes, which Miller claims is the only way that he could violate the order; that the prosecution did not prove that he violated either § 14-288.20(b)(1) or § 14-10; and that the prosecution failed to prove that he acted willfully in violation of the order because it is not clear and definite in its terms. We take these contentions in turn.

A

An essential element of a contempt conviction is that the prosecution show that the defendant violated a valid court order. *Richmond Black Police Officers Ass'n* v. *City of Richmond*, 548 F.2d 123, 129 (4th Cir. 1977). Miller correctly notes that the prosecution did not introduce the court's January 18, 1985 order into evidence. The district court did, however, take judicial notice of the order and placed it before the jury for consideration in its deliberations. And while Miller complains that the prosecution did not request that the court take judicial notice of the order, such a request is not a necessary prerequisite of judicial notice. Fed. R. Evid. 201 provides that "[a] court may take judicial notice [of an appropriate fact], whether requested or not." We think that the district court was well within its discretion to take judicial notice of its order and by this means to lay it before the jury for consideration.

B

Miller's next contention turns on a change in the wording of the order. The original draft of the settlement agreement entered into between Person and Miller prohibited Miller from: "operat[ing] a paramilitary organization *or* do[ing] certain other acts prohibited by North Carolina General Statutes 14.288(b)(1) and (b)(2) and North Carolina G.S. 14-10." (Emphasis added.) At Miller's insistence, and with the agreement of Person's counsel, this passage was changed to read: "operat[ing] a paramilitary organization *and* do[ing] other acts . . ." (same). This change was then incorporated into the court's January 18, 1985 order. Miller here argues that this change

from the disjunctive "or" to the conjunctive "and" establishes that the parties intended that a violation of the order involve the operation of a paramilitary organization coupled with the simultaneous violation of all three listed North Carolina statutes.

But Miller himself admits that the word "and" can be used in the conjunctive or disjunctive sense. *See United States* v. *Goodwin*, 637 F.2d 250, 256 (4th Cir. 1981), *rev'd on other grounds*, 457 U.S. 368 (1982). In this case, reading the word "and" in the disjunctive is strongly supported by the fact that each North Carolina statute proscribes an independently wrongful act. Miller's interpretation would mean that the court order gave Miller permission to violate some state laws, at least in relation to a violation of the order, so long as he did not violate all three listed statutes at the same time. Such an interpretation ignores the obvious and broad purpose of Person's suit and the resulting order, which was to prevent conduct impairing the exercise of class members' rights as protected by federal and state law. This purpose would be frustrated by the interpretation Miller urges.

Miller's argument also ignores the scope of the change. As originally drafted, the consent agreement as reasonably read prohibited the doing of any one of four independent acts: operating a paramilitary organization, violating § 14-288.20(b)(1), violating § 14-288.20(b)(2), or violating § 14-10. The change was simply intended to clarify that the operation of a paramilitary organization alone would not violate the agreement. Instead, this action would have to be done in conjunction with a violation of at least one of the three listed statutes to give rise to a violation of the order.

C

Miller next contends that the prosecution failed to prove that he violated § 14-288.20(b)(1). Specifically, he argues that (1) the prosecution never proved he had direct involvement in any activities that would violate the statute, and (2) the prosecution did not show the immediate threat of a civil disorder.

The simple answer to Miller's first point is that it misperceives the prosecution's theory of the case. The prosecution never contended that Miller himself actively engaged in conduct violative of § 14-288.20(b)(1). Rather, the prosecution argued that the conduct was carried out by Miller's agents, Stephen Miller and others, under the direct orders of Miller as head of the CKKKK. The district court properly informed the jury in its instructions on the agency theory.

Miller counters by arguing that he approved the activities allegedly violative of § 14-288.20(b)(1) prior to the entry of the court order. On this point, the prosecution introduced evidence that Miller instructed his agents to engage in such activities indefinitely and that they continued past the entry of the order. Under such circumstances, and as leader of the CKKKK, Miller had an obligation to put a halt to the prohibited activities. We believe that the jury could reasonably infer that Miller knew the prohibited activities were continuing and that he tacitly approved their continuance in dereliction of his obligation pursuant to the court order.

Miller's second point is also without merit. Section 14-288.20(b)(1) proscribes the undertaking of certain activities with the knowledge or intent that they are "[f]or use in, or in furtherance of, a civil disorder." Miller accurately notes that a civil disorder is defined as

> any public disturbance involving acts or violence by assemblages of three or more persons, which causes an immediate danger of damage or injury to the property or person of any other individual or results in damage or injury to the property or person of any other individual.

N.C. Gen. Stat. § 14-288.20(a)(1). He contends that the prosecution failed to show that he engaged in or ordered any acts threatening the requisite "immediate danger."

Miller's interpretation, however, would force us to rewrite § 14-288.20(b)(1) to read "immediate civil disorder." As written, the prosecution need only prove that the prohibited activities were engaged in with the intent of furthering a civil

disorder at some point in time. We think that the prosecution produced ample evidence from which the jury could conclude that Miller intended that the prohibited activities were in furtherance of a plan to cause a civil disorder in the future.

Miller also argues that the prosecution did not prove that he violated § 14-10 because it did not show that the CKKKK was not authorized to conduct military evolutions or that it did not qualify for the school exemption from the prohibition on such conduct. Again, we think there was ample evidence from which the jury could find Miller violated § 14-10.

The chief military officer of the State of North Carolina, General Charles Scott of the North Carolina National Guard, listed those organizations authorized to conduct military evolutions and the list did not include the CKKKK. He explicitly stated that neither Glen Miller, Stephen Miller, nor the WPP were to his knowledge authorized by law to conduct military operations in North Carolina. General Scott also testified that in addition to high school and college ROTC programs, the State has only one accredited military academy. Moreover, it is beyond peradventure that the school exemption to § 14-10's prohibition on engaging in military evolutions does not apply to a group like the CKKKK that is engaged in practicing guerrilla warfare aimed at subverting the government. *Cf. Bob Jones Univ.* v. *United States*, 461 U.S. 574, 591 n.18 (1983) (for example, tax exemption for educational organizations would not apply to former band of military personnel who set up a school for training in guerrilla warfare).

D

Finally, Miller argues that the prosecution failed to prove that he willfully violated the court's order because it was not clear and definite in its terms. He claims that his interpretation of the order, as discussed in Part II(B) above, is at least reasonable, and thus precludes such a finding of willfulness.

As a threshold matter, we again question whether Miller's interpretation is reasonable. In any event, the questions of

whether the order was clear and definite, as well as whether Miller intentionally and willfully violated it, were submitted to the jury and resolved against him. We believe that there was ample evidence to support the jury's findings. We note that Miller had referred in his newsletter to the consent decree as a "scrap of paper."

III

Miller's next challenge involves the service of Morris Dees, counsel to Person in the underlying civil litigation, as special counsel to prosecute the contempt action against Miller. While in his pre-trial motion to disqualify Dees, Miller styled his claim as a Due Process violation, he only claims on appeal that Dees' appointment violated the rule established in *Young* v. *United States ex rel. Vuitton Et Fils S.A.*, ___ U.S. ___, 107 S. Ct. 2124 (1987).

In *Young*, decided after the verdict in this case, the Supreme Court held that counsel for a party that is a beneficiary of a court order could not be appointed to prosecute a contempt action alleging a violation of that order. Bypassing the Due Process claim alleged by the petitioners, the Court grounded its holding in an exercise of its supervisory power.

Young obviously has relevance to the issue of Dees' authorized participation in the prosecution of the contempt citation in this case, but it is not dispositive because it dealt with a significantly different issue: whether a contempt prosecution can be turned over completely to private, interested counsel. The issue here is whether and, if so, to what extent, private counsel for interested parties may be authorized to participate with government counsel in such a prosecution.

Young flatly proscribes turning the prosecution completely over to private counsel for interested parties, but it certainly did not proscribe all participation by such counsel. Indeed, and to the contrary, the *Young* Court was at pains to point out that private counsel's greater familiarity with the case might properly "be put to use in *assisting* a disinterested prosecutor in

pursuing the contempt action." *Young*, 107 S. Ct. at 2137 n.17 (emphasis in original). The limits of such allowable assistance were also suggested: assistance may not extend to the point that "counsel for the private party [is] . . . in control of the prosecution." *Id.*

We therefore read *Young* at least implicitly to approve (or certainly not to forbid) the practice of allowing private counsel for interested parties to participate formally with government counsel in the prosecution of contempt citations so long as that participation (1) has been approved by government counsel; (2) consists solely of rendering assistance in a subordinate role to government counsel; and (3) does not rise in practice to the level of effective control of the prosecution. As indicated, we find authority for this rule of limited participation at least implicit in *Young* and we think it wholly conformable to *Young's* underlying principles. Accordingly, we adopt it as the appropriate rule governing the participation of private counsel for interested parties in contempt prosecutions.

Applying the rule to the facts of this case, we find no reversible error in the permitted participation of Dees in the contempt prosecution here in issue. Specifically, we conclude that the government's approval of Dees' participation, though belated, was timely and otherwise effective under the circumstances for the relevant purposes; that Dees' participation was limited in its total compass to assisting government counsel in a subordinate role; and that once government counsel timely assumed effective control, Dees did not thereafter assume effective control by virtue of the nature and extent of his participation.

While conceding that *Young* did not proscribe any and all participation by Dees, Miller contends that in practical effect Dees functioned as "lead" or "primary" counsel - that, in our terms, he effectively, if not formally, controlled the prosecution. In support of this contention he asserts that (1) Dees singly conducted the prosecution until the case was referred to the United States Attorney's Office some two weeks prior to the original trial date; (2) Dees took substantially more time in

opening and closing arguments than did government trial counsel; (3) Dees examined virtually all the significant witnesses, and (4) Dees made and responded to most of the objections and arguments at trial.

Accepting the essential accuracy of these assertions of the degree of Dees' participation, we do not think the issue is properly resolved on such a facile quantitative basis, or by efforts to determine who was "lead" counsel at trial. The critical question is who was in actual control of the prosecution - both formally and in practical effect. The quantitative division of trial work obviously has some relevance to that, but it cannot be decisive. We can conceive of situations in which without ever relinquishing effective control of the prosecution government counsel might for tactical reasons give over even more substantial portions of the actual conduct of trial to particularly skilled or knowledgeable private counsel.

The more appropriate analytic focus is on the evil at which the *Young* rule forbidding total abdication to private counsel for interested parties was aimed. That evil was the possibility that the criminal contempt sanction would be invoked and prosecuted by private counsel, operating in the adversarial mode, solely to secure advantage to his client and hence without regard for any interests of the defendant and the public in fairness of the criminal process. *Young*, 107 S. Ct. at 2136-37. That evil is sufficiently guarded against - both in appearance and reality - by the presence of disinterested government counsel effectively in a position and manifestly prepared to exercise control over the critical prosecutorial decisions - most critically, whether to prosecute, what targets of prosecution to select, what investigative powers to utilize, what sanctions to seek, plea bargains to strike, or immunities to grant. *Id.* It is control over these critical prosecutorial decisions which determine the fairness of particular prosecutions that is the important consideration; operational conduct of the trial is actually of subordinate concern, except as it may actually impact upon the more fundamental prosecutorial decisions.

Analyzed on this basis, Miller's contentions of effective control by Dees are not supported by the record. Though, as indicated, government counsel assumed control belatedly, there is no indication that once assumed it was ceded to Dees in any of the critical respects above identified. We must assume, both because of the general presumption of regularity that attaches to official conduct and because there is no disproof in the record, that when the district court formally directed that the United States Attorney was in control, and would be so considered by the court, that was and continued to be the reality. All of the formal indicia in the record from that point - the written submissions, oral colloquies, government counsel's continued physical presence - support the assumption that it was the reality. Nothing, other than the degree of Dees' participation in the actual conduct of the trial, is advanced to disprove it. As indicated, we do not believe this suffices.

Of course, the fact that in this case Dees instigated and for a time was in sole charge of the prosecution must give us some pause in light of *Young's* direction that "a court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions" before authorizing private counsel to become involved. *Young*, 107 S. Ct. at 2134. Under the circumstances, however, that departure from preferred procedure does not require reversal. As indicated above, the court referred the matter to the United States Attorney immediately upon Miller's motion to disqualify Dees. There is no suggestion that the United States Attorney at that point did not exercise an independent prosecutorial judgment in deciding to proceed on a new complaint nor that had he declined to proceed the district court would have continued to allow Dees to proceed alone. In fact, Miller does not actually point to any specific prejudice attributable to the interval of Dees' sole control, concentrating instead on his participation after government counsel assumed formal control. We are satisfied that in the future district courts will follow the rule we have derived from *Young* and make initial reference to the United States Attorney's Office before authorizing any participation in con-

tempt prosecutions by private counsel. In this instance, we find no reversible error in the failure to do so.

IV

Miller next argues that the district court erred by not excusing for cause all prospective black jurors on the basis that they were beneficiaries of the court order Miller was charged with violating. Miller claims that the court's action forced him to use his peremptory challenges to remove a number of black jurors and that, even given his use of these challenges, he was unable to remove all black jurors.

Challenges for cause are typically limited to situations where actual bias is shown. *United States* v. *Loucas*, 629 F.2d 989, 992 (4th Cir. 1980). Even if bias may be implied in appropriate circumstances, *Smith* v. *Phillips*, 455 U.S. 209, 221-24 (1982) (O'Connor, J., concurring), the doctrine of implied bias is limited in application to those extreme situations where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances. This case does not present one of those extreme situations. *Compare Smith*, 455 U.S. at 222 (noting some circumstances in which a finding of implied bias might be justified).

A criminal contempt proceeding is not simply the continuation of the private parties' civil litigation. Rather, it is a proceeding between the public and the defendant, *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418 445 (1911), that seeks to vindicate the court's authority. *Young*, ____ U.S. at ____, 107 S. Ct. at 2133. In this case, potential black jurors, even as beneficiaries of the court order, have no greater interest in vindicating the court's authority than any other member of the general public who might also be called to serve as a juror. There is simply no pecuniary or other unique benefit to be gained by the beneficiary class from a finding of contempt. *Compare Young*, ____ U.S. at ____, 107 S. Ct. 2136 (benefici-

ary stood to benefit from finding of contempt as court order contained a liquidated damages provision for violation of the order). Whether or not Miller or the WPP were found in contempt, the injunction restricting their activities would continue in effect and inure to the benefit of class members.

In essence, Miller is suggesting that no black citizen could ever serve as an impartial juror in an action involving a white supremacist, group or individual, as a party. But this suggestion extends beyond the boundaries of class membership and proffers the imputation of bias to all those groups or individuals offended by the white supremacy movement. The appropriate way to raise such a wide ranging and generalized claim of bias is by showing actual bias, not by invoking the doctrine of implied bias.

Miller does challenge the district court's refusal to exclude for cause one juror on the basis of actual bias. Miller contends that juror James Farmer, a black man and admitted member of the NAACP, smiled or laughed when asked whether he could render a fair and impartial verdict.

A district court has wide discretion in the conduct of *voir dire*, *United States* v. *Robinson*, 804 F.2d 280, 283 (4th Cir. 1986), as well as in deciding whether to excuse a juror for cause. *Loucas*, 629 F.2d at 992. This discretion includes the evaluation of "potential jurors' inflections and gestures, as well as their actual words." *United States* v. *Griley*, 814 F.2d 967, 974 (4th Cir. 1987). We do not believe that the district court abused its discretion in failing to excuse Farmer for cause, particularly in light of his repeated assertions that he was able to render a fair and impartial verdict on the evidence.[4]

V

Miller next contends that the district court erred by denying his motion for severance. Miller sets forth a number of grounds

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[4] Miller ultimately exercised one of his peremptory challenges to remove Farmer.

in support of his claim: that the common surname shared by him and his co-defendant, Stephen Miller, was a source of confusion that, coupled with the complex nature of the evidence, resulted in a spillover to his prejudice of evidence implicating Stephen Miller; that he was prejudiced by Stephen Miller's *pro se* representation; that his defense was antagonistic to that presented by Stephen Miller; and that he was prevented from presenting exculpatory testimony from Stephen Miller.

The grant or denial of a motion for a severance is a matter committed in the first instance to the sound discretion of the trial court and that court's decision will not be overturned absent a clear abuse of that discretion. *United States* v. *Becker*, 585 F.2d 703, 706 (4th Cir. 1978). Such an abuse of discretion will be found only where the trial court's decision to deny a severance "deprives the defendant[s] of a fair trial and results in a miscarriage of justice." *Id.* (citations omitted). Though the grounds cited by Miller can serve as the basis for the grant of a severance in an appropriate case, we note that neither the presence of antagonistic defenses nor a *pro se* co-defendant is prejudicial *per se*. *See, e.g., United States* v. *Oglesby*, 764 F.2d 1273, 1276 (7th Cir. 1985) (*pro se* defendant); *Becker*, 585 F.2d at 707 (antagonistic defenses). Guided by this narrow standard of review, we do not believe that the district court abused its discretion in denying Miller's motion for severance. We take his specific contentions in turn.

The case itself, contrary to Miller's characterization, is not overly complex. The case was prosecuted on the theory that Miller, by virtue of instructions given to his agents, including Stephen Miller, continued to engage in certain activities even though the court's order prohibited him from doing so. Much of the prosecution's case rested on the testimony of two key witnesses - Holder and Jones.

Nor do we believe that the presence of a common surname between the co-defendants caused undue confusion. The district court's opening instructions warned the jury to distinguish strictly between Glen and Stephen Miller when

listening to the evidence, particularly where the evidence itself did not explicitly make the distinction. In its closing instructions the court warned the jury to consider the case carefully and separately against each co-defendant and that a verdict against one did not necessitate the same verdict against the other. A review of the record reveals that the prosecution was careful to maintain the distinction between the Millers and that the court gave proper limiting instructions that accompanied the admission of evidence that was to be considered as to only one of the co-defendants. While Miller cites various generic references to "Mr. Miller" elicited during Stephen Miller's cross-examination of Robert Jones, a review of Jones' testimony makes clear that Jones is referring to Stephen Miller. In fact, virtually all of the cited instances involve Jones speaking directly to Stephen Miller and formally addressing him as "Mr. Miller."

Miller fares no better with his claim that he was unfairly prejudiced by Stephen Miller's *pro se* representation. As a precaution, the district court instructed the jury that nothing said by the lawyers, with particular reference to Stephen Miller, constituted evidence. The court also appointed stand-by counsel and instructed Stephen Miller that stand-by counsel was available to help him during the trial. Finally, the court strictly policed Stephen Miller's examination of witnesses to prevent him from testifying instead of questioning. While the district court did not follow all of the safeguards recommended by some courts for joint trials involving a *pro se* defendant, *see, e.g.*, *Oglesby*, 764 F.2d at 1276; *United States* v. *Veteto*, 701 F.2d 136, 138-39 (11th Cir. 1983); *United States* v. *Sacco*, 563 F.2d 552, 556-57 (2d Cir. 1977), the steps taken by the district court in this case adequately protected Glen Miller's right to a fair trial.

We also reject Miller's contention that he was prejudiced because his defense strategy was antagonistic to that employed by Stephen Miller. Miller primarily defended on two grounds: that his conduct did not violate the court order and that, even if he did violate the order, he did not do so intentionally and

willfully. Stephen Miller's defense centered around his claim that he did not willfully and intentionally violate the order because he was not aware that it applied to him. We simply do not believe that any conflict between these defenses "is so prejudicial that the differences are irreconcilable, 'and that the jury [would] . . . unjustifiably infer that . . . [any] conflict alone demonstrates that both [defendants] are guilty.'" *Becker*, 585 F.2d at 707 (citation omitted).

Finally,

> [w]here the motion for severance is based, as here, on the asserted need for a co-defendant's testimony, the moving defendant must establish (1) a bona fide need for the testimony of his co-defendant, (2) the likelihood that the co-defendant would testify at a second trial and waive his Fifth Amendment privilege, (3) the substance of his co-defendant's testimony, and (4) the exculpatory nature and effect of such testimony.

United States v. *Parodi*, 703 F.2d 768, 779 (4th Cir. 1983) (citation omitted). Glen Miller has failed to make this showing as he argues on appeal only that he "had every reason to believe that Stephen Miller would testify and that his testimony would have exculpated him." Appellant's Brief at 39-40.

VI

Miller lastly contends that the district court erred by allowing the prosecution to introduce irrelevant and unfairly prejudicial evidence. Specifically, Miller challenges the testimony of Holder and Jones, which, Miller claims, involved events occurring prior to the entry of the court order. The district court admitted this evidence under Fed. R. Evid. 404(b) as probative on the issue of Miller's intent in conducting activities allegedly violative of the court order. Miller challenges both the relevancy of the evidence and the propriety of its admission in light of its unduly prejudicial nature.

Questions related to the relevance of evidence are within the discretion of the district court, and this includes the question of

whether the probative value of certain evidence is outweighed by the risk of undue prejudice its admission presents. *United States* v. *Zandi*, 769 F.2d 229, 237 (4th Cir. 1985).

Holder's testimony was admitted to show that at least prior to the injunctive order, Miller's intention in the conduct of his paramilitary activities was oriented to their offensive uses. The prosecution contended that this same intent guided Miller's continuation of these activities even after the entry of the order. Miller's intent is relevant because § 14-288.20(b)(1) contains a scienter element, specifically, the intent that the conduct prohibited by the statute is undertaken "for use in, or in furtherance of, a civil disobedience." In this regard, Miller had repeatedly maintained, and continued to do so in his defense, that the CKKKK's paramilitary activities were exclusively defensive in character. We think that this evidence was both highly relevant and appropriately limited in effect by the court's instructions. The district court did not abuse its discretion in admitting it.

Jones testified that prior to the entry of the court order, Glen Miller had instructed him to work with Stephen Miller on procuring weapons and providing training for the CKKKK. Jones recounted that Stephen Miller told him that these actions were in furtherance of a plan to engage in armed insurrection against the government. Jones also explained that he continued providing this assistance to the CKKKK and its successor, the WPP, until he was arrested in July 1985 - some six months after the entry of the court order - and that the instructions to do so were never withdrawn.

It is obvious that this evidence goes to the heart of the prosecution's case - the question of whether Miller even engaged in or ordered conduct in violation of § 14-288.20(b)(1) and § 14-10 after the entry of the order. Again, we do not believe that the district court abused its discretion in admitting this evidence.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3882

BOBBY L. PERSON, *Plaintiff-Appellee*,

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,
v.
GLEN F. MILLER, *Defendant-Appellant*,

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and
CAROLINA KNIGHTS OF THE KU KLUX KLAN, etc., *et al*,
Defendants.

FILED SEP 13, 1988

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips, with the concurrence of Judge Russell and Judge Sprouse.

For the Court

/s/ John M. Greacen
Clerk

Supreme Court, U.S.
FILED
JAN 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-792

In the Supreme Court of the United States

OCTOBER TERM, 1988

GLEN F. MILLER, PETITIONER

v.

BOBBY L. PERSON AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's contempt conviction should be reversed on the ground that the district court took judicial notice of the injunction that petitioner was charged with having violated and failed to instruct the jury that it need not take the existence of the order as proved.

2. Whether the court of appeals erred in holding that the case had properly been prosecuted by the United States Attorney with the assistance of the attorney for the civil plaintiffs who had initiated the contempt proceedings.

3. Whether petitioner was entitled to have all blacks excused from the jury "for cause" because the criminal contempt charges against petitioner alleged that he had violated a decree that enjoined interference with the exercise of rights by all blacks in the State.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-792

GLEN F. MILLER, PETITIONER

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BOBBY L. PERSON AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 4a-22a) is reported at 854 F.2d 656.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1988 (Pet. App. 4a). The court of appeals denied a petition for rehearing on September 13, 1988 (Pet. App. 23a). The petition for a writ of certiorari was filed on November 9, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted on two counts of committing criminal contempt, in

violation of 18 U.S.C. 401(3), by disobeying a consent decree that prohibited him from operating a paramilitary organization and from committing other acts contrary to the laws of North Carolina. Pet. App. 2a, 8a. Petitioner was sentenced to three years' probation on the first count and six months' probation on the second count. *Ibid.* The court of appeals affirmed. *Id.* at 22a.

1. In June 1984, respondent Bobby Person filed a civil rights action, naming as defendants the Carolina Knights of the Ku Klux Klan, petitioner (who was the leader of the Klan), and other individuals associated with the Klan. Pet. App. 5a. The complaint alleged that the defendants had committed violent and intimidating acts against blacks in North Carolina "with the intent of depriving them * * * of the equal protection of the laws, and of otherwise violating their rights under federal and state law." C.A. App. 2. Pursuant to Fed. R. Civ. P. 23(b)(2), the district court ultimately certified a plaintiff class consisting of "all black citizens in the State of North Carolina who seek to exercise their state and federal rights free from interference by the defendants." Pet. App. 5a.

In January 1985, the parties entered into an agreement, which the parties authorized the court to enter as a consent decree, prohibiting the defendants from "operat[ing] a paramilitary organization" and from committing certain other related acts prohibited by North Carolina law.[1] Pet. App. 5a-6a. Petitioner signed the agreement. C.A. App. 33-34. On January 18, 1985, the district court held a

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[1] To simplify, the three provisions of North Carolina law identified in the agreement, N.C. Gen. Stat. §§ 14-10, 14-288.20(b)(1), 14-288.20(b)(2) (1987), concern assembling to practice military exercises, teaching the use of violence for use in furtherance of a civil disorder, and assembling for training in the use of violence for furthering a civil disorder.

hearing, which petitioner attended; the same day the court entered an order that embodied the agreement in a consent decree (Pet. App. 6a) and directed Person to give notice to the absent members of the plaintiff class (C.A. App. 39-40). After constructive notice was effected (*id.* at 42-69), the court substituted the Klan's successor organization, the White Patriot Party (WPP), for the Klan and made its decree final on September 17, 1985 (*id.* at 70-72).

2. On April 22, 1986, Person's counsel, Morris Dees, filed a motion asking the district court to hold petitioner and the WPP in criminal contempt. The supporting complaint, as later amended, alleged that petitioner and the WPP were continuing to operate a paramilitary organization and were violating two of the North Carolina statutes referred to in the decree. Pet. App. 6a; C.A. App. 115, 177, 228, 261. In response, the court ordered petitioner to show cause why he should not be held in contempt. Pet. App. 7a.

For approximately two months, Dees acted as the prosecutor of the contempt proceeding without objection by petitioner. On June 12, 1986, however, petitioner moved to disqualify Dees on the ground that Dees was likely to be a material witness. Pet. App. 7a. The district court stated that Dees was not likely to be a witness (C.A. App. 193), but in order to avoid even the appearance of impropriety, the court ordered "that the criminal prosecution of this action shall be under the direct supervision and control of the United States Attorney for this district. Plaintiffs' counsel may assist the United States Attorney prior to and during the course of the trial * * *." *Ibid.*

At the beginning of jury selection, the court described the case to the venire so that the prospective jurors could answer questions about their connection with the case and their ability to render an unbiased judgment. The court specifically recounted the existence and contents of the

consent decree. C.A. App. 522-523.[2] Subsequently, petitioner challenged all of the black persons on the venire for cause, contending that they were members of the class benefited by the order that petitioner was charged with having violated. *Id.* at 573, 585, 617. The court denied the challenges for cause. Petitioner used his peremptory challenges, however, to rid the jury of all but one black person.

At the close of the government's case, petitioner moved for a judgment of acquittal. Petitioner alleged as one ground that no evidence had been presented showing the existence of the court order that formed the basis of the prosecution. C.A. App. 1107-1108. The court rejected that ground, stating (*id.* at 1108): "I think the court order is a part of the proceeding itself. I don't deem it necessary to introduce evidence of that." Petitioner was found to have operated a paramilitary organization and to have violated two provisions of North Carolina law as charged. Pet. App. 8a.

3. The court of appeals affirmed. Pet. App. 1a-22a. Petitioner argued that the consent decree had never been placed in evidence and that, even if the district court's statement (quoted above) is construed as taking judicial notice of the order, that notice was improper because no one had requested it. *Id.* at 9a. The court of appeals concluded, to the contrary, that the district court had in fact taken judicial notice of its order, "by this means * * * lay[ing] it before the jury for consideration" (*ibid.*), and that Fed. R. Evid. 201 permitted the court to take judicial notice of the order sua sponte (Pet. App. 9a).[3]

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[2] Contrary to petitioner's suggestion (Pet. 22-23), the court did not tell the venire about the existence of a beneficiary class or about the class-action nature of the original suit. See C.A. App. 585.

[3] In his reply brief in the court of appeals, petitioner argued that the government failed to prove that he had actual notice of the decree.

The court of appeals also rejected petitioner's contention that Dees's role in prosecuting the contempt was excessive under this Court's decision in *Young* v. *United States ex rel. Vuitton Et Fils S.A.*, No. 85-1329 (May 26, 1987).[4] Rather than conducting a quantitative comparison of the trial activities of the government prosecutor and Dees, as petitioner suggested, the court held (Pet. App. 14a-15a) that, under *Young*, the proper inquiry was whether the disinterested, government prosecutor had control over critical prosecutorial decisions.[5] The court determined that petitioner had not shown that he had been prejudiced by Dees's activities during the short period before the United States Attorney took over the prosecution. *Id.* at 16a. The court also concluded that there was no indication that the United States Attorney, once he came into the case, ever relinquished control over any critical prosecutorial decisions. *Ibid.*

Finally, the court of appeals rejected petitioner's argument that the district court erred in not excluding all blacks

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The court of appeals did not comment on that contention. Petitioner has never denied either the existence of the order or his notice of it.

[4] In *Young*, which was decided after the verdict in this case, this Court held that counsel for a party who is the beneficiary of a court order may not be placed in charge of prosecuting a contempt action that alleges a violation of that order. The Court explained that permitting such an interested party to prosecute a contempt creates "*opportunities* for conflicts to arise" and presents "at least the *appearance* of impropriety." Slip op. 18. This Court added, however, that private counsel's unique familiarity with the case could be put to use in assisting the disinterested prosecutor. *Id.* at 18 n.17.

[5] Such decisions, the court of appeals said (Pet. App. 15a), included decisions about what targets to pursue, what methods of investigation to use, what information to seek or use, what offenses and what persons to charge, whether to enter into a plea bargain, and whether immunity should be granted. See also *Young*, slip op. 17.

from the jury for cause. Pet. App. 17a. The court of appeals reasoned that challenges for cause are generally limited to instances of actual bias and that this case did not involve one of the "extreme situations" where it is appropriate to invoke the doctrine of implied bias. *Ibid.* The court explained that the criminal contempt proceeding was "not simply the continuation of the private parties' civil litigation," but was "a proceeding between the public and the defendant" brought to vindicate the court's authority. *Ibid.* The plaintiff class that is the beneficiary of the consent decree, the court added, had no "pecuniary or other unique benefit to be gained" from this criminal proceeding, and the decree would remain in force regardless of the outcome of this prosecution. *Id.* at 17a-18a.[6]

ARGUMENT

1. Petitioner challenges on two grounds the court of appeals' conclusion that the existence of the consent decree was properly established. He first argues (Pet. 10-12) that the district court did not take judicial notice of the order in a legally adequate manner. That claim, however, was neither raised nor considered below. In the court of appeals, petitioner did not challenge the formal adequacy of the district court's taking judicial notice of the consent decree. Rather, conceding that the district court "apparently took judicial notice of its order" (Br. 14), petitioner argued that the order could not be judicially noticed but had to be proved, and he suggested that the court's act of taking judicial notice was ineffective because the government had never requested that notice be taken. In

[6] In addition to the three challenges described above, the court of appeals rejected petitioner's several other contentions as well. Pet. App. 9a-13a, 18a-22a.

any event, petitioner's claim of inadequate judicial notice is incorrect on the merits: the district court clearly identified the subject of the judicial notice, the consent decree; indeed, it informed the venire of the decree's existence and contents during voir dire (C.A. App. 522-523) and gave the jury a copy of the order to take to the jury room for deliberations (C.A. App. 1416-1418).[7]

Petitioner also contends (Pet. 12-13) that, if the order was properly noticed, the district court violated Fed. R. Evid. 201(g) by failing to instruct the jury that it may but need not take the existence of the order as proved. Petitioner raised that point only in a footnote in his reply brief in the court appeals (at 3 n.1), and the court of appeals did not address the issue.[8] In any event, the district court's failure to give the Rule 201(g) instruction would not justify reversal of petitioner's convictions. Petitioner neither asked the district court to give such an instruction nor made a contemporaneous objection to the charge given. See Fed. R. Crim. P. 30 ("No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to con-

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[7] Petitioner adds to his claim regarding the adequacy of the judicial notice a suggestion (Pet. 10 n.8) that there was insufficient evidence that petitioner had knowledge of the decree. That claim is not within any of the questions presented (Pet. i); in particular, it is not within the judicial notice question. Moreover, petitioner did not make the argument until his reply brief in the court of appeals (at 3-4), and the court of appeals did not separately address it. The court of appeals did conclude that there was sufficient evidence to support the jury's finding that petitioner intentionally violated the decree (Pet. App. 12a-13a), which implies that he had knowledge of the decree. We note, too, that petitioner signed the agreement that was entered as a consent decree. C.A. App. 34.

[8] Because the court of appeals in this case did not rule on any jury instruction question, petitioner's suggestion of an intercircuit conflict on the issue (Pet. 9) is incorrect.

sider its verdict * * *."). And the failure to give a Rule 201(g) instruction did not constitute plain error within the meaning of Fed. R. Crim. P. 52(b), for there was no miscarriage of justice here. Petitioner has never disputed that the consent decree existed (and was the document given to the jury); and the jury could not possibly have found that the decree did not exist after the court interpreted the decree, explained to the jury what it must find in order to conclude that the decree had been violated, and permitted the jury to take the decree to the jury room. See, *e.g.*, *United States* v. *Frady*, 456 U.S. 152 (1982).[9]

2. Petitioner next contends (Pet. 14-21) that the court of appeals' ruling is contrary to this Court's decision in *Young* v. *United States ex rel. Vuitton Et Fils S.A.*, *supra*. That contention is meritless. The court of appeals in no way departed from *Young*'s holding that an attorney for a beneficiary of a court order should not be appointed as the sole or principal prosecutor in a contempt prosecution for violating the order. Rather, the court correctly determined

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[9] The decision of the court of appeals does not conflict with *United States* v. *Mentz*, 840 F.2d 315 (6th Cir. 1988). First, as we have explained, the court of appeals in the present case did not address either of the two issues on which petitioner cites *Mentz*—the formal adequacy of judicial notice and the validity of a court's instruction on an essential element of an offense. In any event, on the first question, *Mentz* did not in fact rule on the formal adequacy of a district court's attempt to take judicial notice, but found that there had not been any such attempt (*id.* at 322); moreover, the district court in the present case identified "the fact noticed and articulate[d] its justification" (Pet. 11), as *Mentz* notes a trial court should do. On the Rule 201(g) question, *Mentz* involved a question of harmless error, because the defendant objected to the jury instruction in a timely manner; the present case involves a question of plain error, because petitioner did not make a timely objection to the court's failure to give the instruction in question.

(Pet. App. 13a-17a) that respondent Person's lawyer, Dees, did no more than assist the disinterested government attorney in the prosecution, a practice that *Young* approved. Slip op. 18 n.17.

The court of appeals correctly declined to evaluate Dees's role in the present prosecution by a quantitative assessment of how much of the trial work Dees performed: under *Young*, the proper inquiry was whether Dees was subject to the government attorney's control with regard to all critical decisions. See *Young*, slip op. 18 n.17 (private counsel's "familiarity [with the charged conduct] may be put to use in *assisting* a disinterested prosecutor in pursuing the contempt action, but cannot justify permitting counsel for the private party to be in control of the prosecution"). With respect to the period before the United States Attorney entered the case, the court of appeals determined (Pet. App. 16a) that Dees made no final and irrevocable decisions on matters requiring prosecutorial discretion; the court noted that petitioner did "not actually point to any specific prejudice attributable to the interval of Dees' sole control" (*ibid.*). When the United States Attorney entered the proceedings, he filed a new contempt complaint to reinitiate the prosecution (*id.* at 7a), and he entered under an order of the district court that he exercise "direct supervision and control" over the prosecution (*id.* at 7a, 16a). There was no reason, the court of appeals concluded (*id.* at 16a), to doubt that the United States Attorney actually maintained the control that the district court order required. In addition to noting the "presumption of regularity" (*ibid.*), the court of appeals pointed out that all of the formal indicia of control suggested as much, and the record contained no evidence suggesting the contrary.[10]

[10] Petitioner's descriptions of the tasks performed by Dees (Pet. 16, 18) in no way undermine the court of appeals' conclusion that Dees was not in control.

The court of appeals' determination that government counsel retained control over the prosecution—so that petitioner was not subject to a prosecution directed by an interested person—correctly applies the *Young* decision to the record in this case. That factbound determination raises no general issues concerning the proper interpretation of *Young*; nor, contrary to petitioner's allegation (Pet. 19), does it create any conflict among the circuits.[11] In addition, the peculiar circumstances presented here, involving the initiation of a contempt prosecution by private counsel, are not likely to recur. The contempt prosecution in this case took place prior to this Court's decision in *Young*. As the court of appeals stated (Pet. App. 16a-17a), in the future district courts will no doubt "follow the rule * * * derived from *Young* and make initial reference to the United States Attorney's Office before authorizing any participation * * * by private counsel."

3. Petitioner contends finally (Pet. 21-24) that, under the Fifth Amendment Due Process Clause, he was entitled to have the court strike all of the black potential jurors for cause. His theory is that bias should have been imputed to all of those jurors as a matter of law, even if there was no evidence of actual bias on their part, because all were "class beneficiaries" of the consent decree whose violation was at issue in the contempt proceeding. The court of ap-

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[11] Petitioner points to the Sixth Circuit's decision in *Polo Fashions, Inc.* v. *Stock Buyers Int'l, Inc.*, 760 F.2d 698 705 (1985), cert. denied, 482 U.S. 905 (1987). The Sixth Circuit there held that counsel for an interested party may not act as "sole or primary counsel." Although the Sixth Circuit did not define "primary counsel," it presumably meant the term to refer to the attorney who controls the prosecution, not the attorney who examines the largest number of witness. In any event, *Polo Fashions* was decided prior to this Court's decision in *Young*.

peals' rejection of that contention is correct and does not warrant this Court's review. Pet. App. 17a-18a.

Petitioner cites no decision finding implied bias in circumstances like those presented in this case. Nor is there any reason to believe that the peculiar circumstances here present any recurring problem that should be addressed by this Court. In any event, this is not one of those "extreme situations" (*Smith* v. *Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring)) in which the law might justifiably impute bias even where no actual bias could be found.

Any personal interest the black venirepersons might have had in the contempt prosecution was highly attenuated. Although they were members of the plaintiff class in the underlying civil suit, "contempt proceedings arising out of civil litigation 'are between the public and the defendant, and are not part of the original cause.' " *Young*, slip op. 16 (quoting *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 445 (1911)). Indeed, it is because the contempt proceeding is designed to vindicate the court's authority, and not to serve the interests of any private parties, that *Young* requires a disinterested prosecutor. Moreover, even if in some contempt cases individual beneficiaries of the underlying court order have a sufficient personal interest to impute bias to them, it would not be appropriate to impute such bias to all members of a large, diffuse class like the class involved in the present case, including all those persons who have never been personally subject to unlawful conduct at the hands of petitioner or his organizations.[12] That is especially so where, as here, a finding of implied bias, by drawing

[12] Petitioner suggests (Pet. 23 n.12) that class members had a pecuniary interest in the contempt proceeding because they might pursue damages claims by reopening the underlying civil suit if the consent decree were breached. But even aside from the speculative nature

an express racial line, would exclude all black citizens in the State. This Court has recognized in other contexts that "[e]xclusions of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson* v. *Kentucky*, 476 U.S. 79, 85 (1986).

In these circumstances, there is no justification for departing from the ordinary practice of requiring proof of actual bias where a litigant alleges bias as a ground for striking a potential juror. *Smith* v. *Phillips*, 455 U.S. at 215; see also *United States* v. *Loucas*, 629 F.2d 989, 992 (4th Cir.), cert. denied, 450 U.S. 1030 (1980).[13] The op-

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of the suggestion that the contempt proceeding might lead to a reopening of the original suit (see also *In re Virginia Elec. & Power Co.*, 539 F.2d 357, 367 (4th Cir. 1976) ("bare expectancy" of damages is not sufficient to require disqualification of judge who is class member in the suit)), petitioner overlooks the fact that the civil complaint in the present case did not seek damages from petitioner at all and did not seek damages on behalf of the class from any defendant. C.A. App. 17.

[13] Contrary to petitioner's suggestion (Pet. 21-22), *In re Cement Antitrust Litigation*, 688 F.2d 1297, 1308-1310 (9th Cir. 1982), aff'd mem., 459 U.S. 1191 (1983), did not involve a judicial disqualification based on mere party status under 28 U.S.C. 455(b)(5); rather, it involved disqualification under 28 U.S.C. 455(b)(4) based on the financial interest of the judge's wife. The class of all black citizens in North Carolina has no such financial interest in this case.

Indeed, where questions similar to the question presented here have arisen with respect to judges in civil suits who are technically members of a beneficiary class, the courts have reached conclusions similar to that reached by the court of appeals in this case. See, *e.g.*, *United States* v. *Alabama*, 828 F.2d 1532, 1541-1542 (11th Cir. 1987), cert. denied, No. 87-1200 (June 20, 1988) (that a black judge's children were members of the plaintiff class of all blacks who might want to go to a state university in the Montgomery area does not require disqualification because the "interest" is in a public matter and is broadly shared by all young black Alabamians); *In re City of Houston*, 745 F.2d 925 (5th Cir. 1984) (black judge need not disqualify herself from

portunity to ask questions to disclose bias on the part of potential jurors is adequate to the task of ensuring that defendants like petitioner are tried by an impartial jury. Petitioner was not denied such an opportunity, and there is no reason to doubt that he was convicted by an impartial jury in accordance with the requirements of due process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1989

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voting rights case, where class consisted of all black and Hispanic voters); *Christiansen* v. *National Savings & Trust Co.*, 683 F.2d 520 (D.C. Cir. 1982) (judges who are federal Blue Cross-Blue Shield participants not disqualified from case brought by such participants where no monetary relief is sought); *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794 (10th Cir. 1980) (self-disqualification by judge as natural gas consumer reversed); *Plechner* v. *Widener College, Inc.*, 569 F.2d 1250 (3d Cir. 1977) (judge need not disqualify himself because of membership in the American Bar Association, a party).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GLEN F. MILLER,

Petitioner

v.

BOBBY L. PERSON and
UNITED STATES OF AMERICA,

Respondents

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUMMARY OF THE ARGUMENT

This case presents a setting in which the court of appeals committed three fundamental errors: First, the court of appeals implicitly overruled petitioner's Sixth Amendment and Rule 201(g) challenge to the trial court's charge that the jury was required to accept the existence of the injunctive order as a matter of law. Second,

the court of appeals misapplied this Court's decision in Young v. U. S. ex rel. Vuitton et Fils S.A., 107 S. Ct. 2124 (1987), where the district court authorized respondent's counsel in the underlying civil proceeding, rather than a disinterested attorney, to instigate and for a time remain in sole charge of the prosecution, and special counsel controlled the prosecution after appointment of government counsel. Third, the court of appeals refused to imply bias to jurors alerted during voir dire that they were class beneficiaries of the injunctive order and parties in the underlying civil litigation under Fed. R. Civ. P. 23(b)(2). Respondent endeavors to portray the facts in a false light and the issues as seemingly unimportant in an effort to dissuade this Court from addressing significant questions--questions involving petitioner's right to be prosecuted by a fair and impartial prosecutor and the right to a trial by an impartial jury--governing future decisions in this and other circuits.

Conceding that petitioner challenged the district court's authority to judicially notice the injunctive order and charge to the jury that it was required to accept that order as a matter of law, respondent nevertheless claims that trial counsel's failure to object to the instruction does not constitute plain error under Fed. R. Crim. P. 52(b) and that the jury could not possibly have found that the decree did not exist. Respondent conveniently overlooks the fact that it raised no plain error argument before the court of appeals and that trial counsel's motion for acquittal raising the absence of the injunctive order adequately preserved the point without the necessity of a formal objection to the district court's charge. While the jury's finding regarding the existence of the injunctive order may have been fait accompli, petitioner was nevertheless entitled to have the jury pass upon all facts judicially noticed, including the existence

of the injunctive order, consistent with his Sixth Amendment right to trial by jury and Fed. R. Evid. 201(g).

Relying upon the court of appeals' assumption that in the future district courts will refer contempt proceedings to the United States Attorney's Office before authorizing participation by private counsel, respondent claims that the fact scenario presented in the instant case will never reoccur. Respondent, like the court of appeals, totally ignores the fact that petitioner was entitled to be prosecuted by a disinterested and impartial prosecutor regardless of what may occur in the future and that all critical decisions incident to prosecution were made outside the presence of the trial court by special counsel before the district court's belated appointment of the United States Attorney just two weeks before the case was originally scheduled for trial. Furthermore, respondent's claim that the court of appeals correctly declined to evaluate special counsel's role in the prosecution after appointment of government counsel ignores the fact that the prosecution was already tainted by special counsel's control prior to appointment and that his participation after appointment amounted to control. Assuming arguendo that district courts will henceforth refer criminal contempt prosecutions to the United States Attorney's Office before authorizing participation by private counsel, the question when and under what circumstances assistance becomes control will nevertheless reoccur in every future case in which special counsel participates with disinterested counsel absent definitive guidelines articulated by this Court.

Finally, respondent claims that bias should not be implied to jurors who are members of a large, diffuse class and that the peculiar factual setting presented here will not reoccur in an

effort to dissuade this Court from granting certiorari. While there may be some instances in which parties in underlying civil litigation and class members in large, diffuse classes could sit fairly and impartially, bias should be implied in this instance in light of the disclosures made by the trial judge regarding the background of the case (App. 522, 524) and the remarks made by the United States Attorney asking jurors to vindicate their rights and the rights of other black citizens. (App. 657, 661.) The issue is whether petitioner was denied his right to a trial by an impartial jury and not whether the fact scenario presented here will reoccur.

ARGUMENT

I

RESPONDENT FAILED TO RAISE ANY PLAIN ERROR CLAIM AND, IN ANY EVENT, PETITIONER'S MOTION FOR ACQUITTAL PRESERVED THE POINT CHALLENGING THE DISTRICT COURT'S CHARGE.

Respondent urges for the first time on appeal that the trial court's failure to give a Rule 201(g) instruction did not constitute plain error and that the jury could not possibly have found that the decree did not exist. Respondent's claim is disingenuous and is intended to distract the Court's attention from the fact that the district court's charge denied petitioner his Sixth Amendment right to trial by jury on all essential elements of the crime charged and that Rule 201(g) clearly evidences congressional intent to preserve the jury's "traditional prerogative to ignore even uncontraverted facts in reaching a verdict." United States v. Jones, 580 F.2d 219,

224 (6th Cir. 1978). Moreover, respondent's plain error claim was never raised in the court of appeals and is not properly before this Court on certiorari.[1] See generally, Stern, Gressman & Shapiro, Supreme Court Practice at 364 (6th Ed. 1986). Significantly, the court of appeals did not hold that petitioner waived his Rule 201(g) claim by failing to object to the district court's charge. Respondent's ability to raise that question before this Court is foreclosed by the absence of any such holding. United States v. Ortiz, 422 U.S. 891, 898 (1975).

But to be sure, it was not incumbent upon trial counsel to object to the district court's charge. Trial counsel preserved the point by challenging the adequacy of the evidence regarding the existence of the injunctive order in his motion for acquittal. See generally, Wright, Federal Practice and Procedure, at 289 (1982). The instant case is, therefore, controlled by harmless error rather than the more stringent plain error doctrine. United States v. Morgan, 581 F.2d 933 (C.A. D.C. 1978).

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[1] Fed. R. Crim. P. 52 provides that errors not specified will be disregarded unless they affect the substantial rights of the parties, but that plain errors affecting substantial rights may be noticed even though they were not brought to the attention of the trial court. Similarly, this Court's Rule 34(a) provides that it may consider plain error evident from the record and otherwise within its jurisdiction to decide. While the court of appeals did not explicitly address the validity of the trial court's charge, this Court certainly has authority to address that issue and, at the very least, should remand the case to the court of appeals for consideration of that question. Cf. Youakim v. Miller, 425 U.S. 231 (1976).

II

THE PROSECUTION REMAINED TAINTED BY SPECIAL COUNSEL'S CONTROL PRIOR TO APPOINTMENT OF GOVERNMENT COUNSEL, AND HIS PARTICIPATION AFTER APPOINTMENT AMOUNTED TO CONTROL.

Respondent claims that the appointment of government counsel to control the criminal contempt prosecution removed any taint from the proceedings during the time special counsel remained in sole charge of the prosecution. That claim ignores the fact that all critical decisions incident to prosecution were made outside the presence of the trial court by special counsel before the district court's belated appointment of the United States Attorney just two weeks before the case was originally scheduled for trial. Those decisions included, inter alia, the determination of which persons would be the target of his investigation, what methods of investigation to use, what information would be sought as evidence, which persons should be charged with what offenses, whether any individuals should be granted immunity, and which persons should be utilized as witnesses. Young, supra, 107 S. Ct. at 2137. Since the record is devoid of any suggestion that those decisions were retracted after appointment of government counsel,[2] the

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[2] Special counsel's participation after appointment of government counsel gives rise to the inescapable conclusion that he never relinquished control. As the Court has already seen, special counsel took substantially more time in opening and closing arguments than did government counsel; he examined all fact witnesses and cross-examined every defense witness; and he responded to most of the objections and arguments at trial.

prosecution remained tainted through conclusion. Special counsel's participation from inception of the prosecution through appointment of the appropriate prosecuting authority and thereafter infected the proceeding with the "potential for private interests to influence the discharge of public duty," id. at 2136-2137 (emphasis in original), rendering harmless error analysis totally inappropriate under the facts of this case. Id. at 2141.

Respondent also claims that the court of appeals correctly declined to evaluate special counsel's role in the prosecution after appointment of government counsel. In doing so, respondent ignores this Court's suggestion in Young that an interested prosecutor's "familiarity may be put to use in assisting a disinterested prosecutor in pursuing the contempt action, but [does not] justify permitting counsel for the private party to be in control of the prosecution." 107 S. Ct. at 2137, n. 17 (emphasis in original). If that limitation is to have any meaning at all, then the court of appeals must not be permitted to place form over substance by reducing this Court's decision in Young to a mere formalistic inquiry into whether disinterested counsel was "officially appointed." The Court should accordingly seize this opportunity to articulate when and under what circumstances assistance becomes control in order to preserve the accused's right to be prosecuted by a fair and impartial prosecutor in every future case in which special counsel participates with government counsel.

III

RESPONDENT'S CLAIM THAT BIAS SHOULD NOT BE IMPLIED TO JURORS WHO ARE MEMBERS OF A LARGE, DIFFUSE CLASS IS WITHOUT MERIT UNDER THE FACTS OF THIS CASE.

Respondent claims that bias should not be implied to jurors who are members of a large, diffuse class in an effort to dissuade this Court from granting certiorari. While there may be some instances in which parties in underlying civil litigation and class members in large, diffuse classes could sit fairly and impartially, bias should be implied in this instance in light of the disclosures made by the trial judge regarding the background of the case (App. 522, 524) and the remarks made by the United States Attorney asking jurors to vindicate their rights and the rights of other black citizens.[3] (App. 657, 661.) Those comments were completely extraneous and unnecessary to the jury's understanding of the charges under the injunctive order, and they infected the proceeding with the probability of substantial bias. Smith v. Phillips, 455 U.S. 209, 229 (1982) (Marshall, J., dissenting).

Finally, respondent claims that the peculiar factual setting presented here will not reoccur. In making that claim, respondent ignores the fact that the right to a trial by an impartial jury lies

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[3] Respondent's reliance upon Batson v. Kentucky, 476 U.S. 79 (1986) is misplaced. Batson bars prosecutors from using peremptory challenges to exclude blacks from jury service solely on racial grounds. This Court recently rejected the opportunity to extend that ruling to defense counsel in Alabama v. Cox, 531 S. 2d 71, cert. denied, 57 U.S.L.W. 3453 (1989).

at the very heart of due process. Irvin v. Dowd, 366 U.S. 717, 721-722 (1961). As this Court observed in Peters v. Kiff, 407 U.S. 493 (1972), actual bias is virtually impossible to prove. It is necessary, therefore, to "decide on principle which side shall suffer the consequences of unavoidable uncertainty." Id. at 504. The issue is not whether the peculiar fact scenario presented here will result in any reoccurring problem as respondent suggests. Instead, the issue is whether petitioner was denied his right to a trial by an impartial jury. Petitioner asks this Court to imply bias to those jurors who were class beneficiaries of the injunction order and parties in the underlying civil litigation under the facts presented here and to preserve his right to trial by a fair and impartial jury.

CONCLUSION

The issues presented in this case present significant questions implicating the right to trial by an impartial jury and the right to be prosecuted by a fair and impartial prosecutor. The resolution of those issues will govern future decisions in this and other circuits. Petitioner accordingly asks this Court to grant the petition and to reverse the judgment of conviction for the reasons stated herein and those previously assigned.

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